

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
CAI Data Systems, Inc.)	File Nos. 88-SAT-P/LA-97;
Application for Authority to Construct,)	32-SAT-AMEND-98
Launch, and Operate a Ka-Band Satellite)	
System in the Fixed Satellite Service)	IBFS Nos. SAT-LOA-19970702-00057;
)	SAT-AMD-19971219-00199;
Petition for Waiver or Extension of)	SAT-AMD-19990930-00093
Milestone)	
		Call Sign S2246
Request for Reassignment		

MEMORANDUM OPINION AND ORDER

Adopted: October 27, 2003

Released: October 27, 2003

By the Chief, International Bureau:

I. INTRODUCTION

1. In this Order, we deny CAI Data System's, Inc.'s (CAI Data) petition for waiver or extension of its milestone. We also declare CAI Data's Ka-band authorization null and void for failure to commence construction of its satellite by August 2002. We also dismiss as moot CAI Data's request for reassignment to the 87° W.L. orbital location. The orbit location that had been assigned to CAI Data, 125° W.L., is now available for reassignment.

II. BACKGROUND

2. In August 2001, the International Bureau (Bureau) assigned orbit locations to "Second Round" applicants proposing to provide fixed-satellite service (FSS) from satellite systems in the geostationary satellite orbit (GSO) using Ka-band frequencies.¹ The Bureau authorized 11 companies to operate GSO Ka-band satellites at a total of 34 orbit locations. In addition to expanding several previously licensed systems, the Bureau licensed several new systems, including CAI Data's. In contrast to the First Ka-band Processing Round, the Second Round applicants were unable to reach an agreement regarding their conflicting requests for orbit assignments. This was because there were not enough orbit locations with both U.S.-date priority for international coordination purposes and coverage of the contiguous United States to accommodate all the applicants. Thus, the Bureau assigned orbital locations based on several factors including each applicant's requests and the Commission's established policy of giving new entrants at least one location capable of serving all 50 states.² The Second Round

¹ Second Round Assignment of Geostationary Satellite Orbit Locations to Fixed Satellite Service Space Stations in the Ka-band, *Order*, 16 FCC Rcd 14389 (Int'l Bur. 2001) (*Second Round Assignment Order*). In 1997, the Bureau licensed 13 applicants to operate FSS systems in the "First Round." Assignment of Orbital Locations to Space Stations in the Ka-band, *Order*, 13 FCC Rcd 1030 (Int'l Bur. 1997).

² *Second Round Assignment Order*, 16 FCC Rcd at 14391.

Assignment Order provided that, as with previous assignment plans, requests for changes in the orbit assignment plan would be entertained if they were consistent with the basic structure of the plan and agreed to by most, if not all, of the operators affected by the change. Licensees were afforded 30 days to file such requests.³

3. CAI Data's Second Round application requested construction, launch, and operating authority for one satellite to be located at the 87° W.L. orbit location. In its application, CAI Data acknowledged that the 87° W.L. location had already been assigned to Motorola, Inc. in the First Ka-band Processing Round but requested the assignment in the event that the location became available.⁴ At the time the Bureau issued the Second Round authorizations, the 87° W.L. orbit location was still assigned to Motorola and was not available for reassignment. Instead, the Bureau assigned CAI Data to the 125° W.L. orbit location in accordance with its policy to provide new entrants with one 50-state coverage location that had U.S. date-priority for international coordination.⁵ In addition, as set forth in the Commission's rules, CAI Data's license contained explicit deadlines or "milestones" for system implementation. The first implementation milestone required CAI Data to commence construction of its satellite by August 2002.⁶ The license also provided that failure to meet any of the milestones would render the authorization null and void.

4. The license afforded CAI Data 30 days to decline the authorization as conditioned. It did not do so. Further, CAI Data did not file a request for a change to the Second Round orbit assignment plan within the 30-day time period afforded by the Bureau or anytime before its August 2002 construction commencement milestone. Rather, in June 2002, CAI Data filed a petition for waiver or extension of the construction commencement milestone.⁷ The basis for its request is the "uncertainty" about which orbital location CAI Data will be constructing and deploying a satellite.⁸ CAI Data anticipated the Commission's denial of a then pending transfer application involving Motorola, which would make the 87° W.L. orbital location available for reassignment. CAI Data claims that its ability to meet its first milestone is "highly dependent" on the Commission's decision of the Motorola application.⁹ CAI Data also claims that if it were to start construction of a satellite for 125° W.L. and then be assigned 87° W.L., it would lose significant time and financial resources.¹⁰ Instead, CAI Data requests an extension or waiver of the construction commencement milestone in order to avoid having to reconfigure its satellite and states that, in turn, it will not seek extensions of the remaining milestones.¹¹ In response to a subsequent Bureau request, CAI Data informed the Commission that it had not executed a non-contingent contract by the August 2002 construction commencement milestone.¹²

³ *Second Round Assignment Order*, 16 FCC Rcd at 14400.

⁴ In its original application, CAI Data requested assignment to any of the 93° W.L., 95° W.L. or 103° W.L. orbit locations. It also indicated preferences for assignment to 79° W.L. or 107° W.L. CAI Data Application, p. 1

⁵ Moreover, three of CAI's five previously requested locations at 93° W.L., 95° W.L., and 103° W.L. were also assigned to First Round licensees. Its other two requested locations at 79° W.L. and 107° W.L. did not have U.S. date-priority.

⁶ CAI Data Systems, Inc., *Order and Authorization*, 16 FCC Rcd 14269, 14275 (Int'l Bur. 2001) (*CAI Data Order*).

⁷ CAI Data Systems, Inc., Petition for Waiver or Extension of Milestone, filed June 26, 2002 (*CAI Data Petition*).

⁸ *CAI Data Petition* at 1.

⁹ *CAI Data Petition* at 4.

¹⁰ *Id.*

¹¹ *CAI Data Petition* at 6.

¹² Response to Request for Contract, Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from James U. Troup, Counsel for CAI Data Systems, Inc. (Sept. 23, 2002).

5. Motorola, Inc. (Motorola) and Teledesic, LLC (Teledesic) filed Joint Comments in response to CAI Data's petition.¹³ Motorola and Teledesic note that CAI Data accepted its license as conditioned. They also state, *inter alia*, that there is no uncertainty as to CAI Data's orbital location since the Commission explicitly denied CAI Data's request for 87° W.L., stating it had been assigned in the First Round.¹⁴

6. The 87° W.L. orbital location became available for reassignment in September 2002.¹⁵ CAI Data filed a request for reassignment to this orbital location on September 16, 2002, one month after its construction commencement milestone.¹⁶

III. DISCUSSION

7. It is long standing Commission policy to impose mandatory construction commencement milestones upon licensees in the fixed-satellite service.¹⁷ The milestone schedule included in each authorization is designed to ensure that licensed entities are proceeding with construction and will launch their satellites into limited orbit spectrum in a timely manner.¹⁸ The Commission imposes these requirements in order to prevent "warehousing" of spectrum and orbital slots by licensees who are not able or willing to build their systems in a timely manner. Construction commencement milestones are particularly important because they provide an initial objective indication as to whether licensees are committed to proceeding with implementation of their systems.¹⁹ The Commission has consistently required licensees to execute non-contingent satellite construction contracts in order to meet their construction commencement milestones.²⁰ Because it is in the public interest to ensure that scarce orbit spectrum resource is being used efficiently, the Commission has strictly enforced milestone schedules.²¹

8. The standard that licensees must meet to justify a milestone extension is well established. Extensions of milestones are granted only when the delay in implementation is due to circumstances beyond a licensee's control.²² A milestone extension will be considered where it is based on tangible, physical, construction-related concerns rather than nebulous assertions such as regulatory uncertainty or technological advancements. The Commission often will deny an extension request where construction of the satellite either has not begun or is not continuing, raising concerns regarding the licensee's intention

¹³ Joint Comments of Motorola and Teledesic, filed July 10, 2002 (*Joint Comments*).

¹⁴ *Joint Comments* at 3.

¹⁵ Application of Motorola, Inc. and Teledesic LLC For Consent to Assignment of Authority to Launch and Operate the Millenium Geostationary Fixed Satellite System, *Memorandum Opinion and Order*, 17 FCC Rcd 16543 (Int'l Bur. 2002).

¹⁶ CAI Data Systems, Inc., Request for Reassignment of Orbit Location (September 16, 2002).

¹⁷ Norris Satellite Communications, Inc., *Memorandum Opinion and Order*, 12 FCC Rcd 22299 (1997).

¹⁸ PanAmSat Licensee Corp., *Memorandum Opinion and Order*, 15 FCC Rcd 18720, 18722 (Int'l Bur. 2000).

¹⁹ Application of Motorola, Inc. and Teledesic, LLC, 17 FCC Rcd at 16547.

²⁰ See, e.g., Norris Satellite Communications, Inc., 12 FCC Rcd at 22203; Morning Star Satellite Company, LLC, *Memorandum Opinion and Order*, 15 FCC Rcd 11350, 11352 (Int'l Bur. 2000), *aff'd* 16 FCC Rcd 11550 (2001).

²¹ See, e.g., Morning Star Satellite Company, 15 FCC Rcd at 11352; Advanced Communications Corporation, *Memorandum Opinion and Order*, 10 FCC Rcd 13337 (Int'l Bur. 1995).

²² Columbia Communications Corp., *Memorandum Opinion and Order*, 15 FCC Rcd 16496, 16497 (Int'l Bur. 2000); Pan Am Sat Licensee Corp., *Memorandum Opinion and Order*, 16 FCC Rcd 11534, 11537 (2001).

to proceed.²³

9. CAI Data's request for extension is based on two assumptions: first, that the Commission *might* find Motorola's authorization to operate at 87° W.L. null and void, thus making the orbit location available for reassignment; and second, that CAI Data would be assigned to 87° W.L.²⁴ Further, CAI Data requested a waiver or extension in order to avoid the time and expense of reconfiguring and redesigning its system *in the event* it is authorized to operate at 87° W.L. CAI Data also states that it never contemplated a location as far west as 125° W.L. because its business plan requires a "more central" location.²⁵

10. CAI Data has not demonstrated circumstances beyond its control justifying an extension. The Commission has repeatedly held that an extension request motivated primarily by economic considerations does not present a sufficient basis for grant of an extension.²⁶ Further, the Commission has explained that while the construction contract must be binding to meet the construction commencement milestone, it does not have to contain unalterable technical specifications.²⁷ Thus, technical or regulatory uncertainty is no excuse for not meeting the first milestone and operators cannot defer contracting due to these alleged uncertainties.²⁸ CAI Data's decision not to enter into a contract but to wait for a possible reassignment is a business decision that does not justify a milestone extension.

11. Further if the 125° W.L. orbit location assignment did not comport with CAI Data's business plans, it had an explicit procedural avenue to request reassignment since it was afforded 30 days to decline its authorization and to request changes to the Second Round Assignment Order. Failure to seek reassignment is tantamount to accepting the orbit location assignment as conditioned.²⁹

12. Moreover we note that there was no guarantee that CAI Data would be assigned to the 87° W.L. orbital location if it became available. CAI Data has cited no rule or policy that entitles it to priority to the spectrum at 87° W.L.³⁰ Indeed, in processing rounds, the Commission historically has resolved competing requests for the same location by assigning one of the applicants to another location.³¹

13. We also conclude that CAI Data's alternative request for a waiver of its milestone deadline is

²³ AMSC Subsidiary Corporation, *Memorandum Opinion and Order*, 8 FCC Rcd 4040 (1993); PanAmSat Licensee Corp., *Memorandum Opinion and Order*, 15 FCC Rcd 18720 (Int'l Bur. 2000).

²⁴ Second Round Assignment of Geostationary Satellite Orbit Locations to Fixed Satellite Service in the Ka-band, *Order*, 17 FCC Rcd 14400, 14401 (Int'l Bur. 2002) (we will entertain requests for available locations if these changes are consistent with the basic structure of our plan and agreed to by all, or at least most, of the satellite operators affected by the change).

²⁵ *CAI Data Petition* at 4.

²⁶ American Telephone and Telegraph Co. and Ford Aerospace Satellite Services Corp., *Memorandum Opinion and Order*, 2 FCC Rcd 4431, 4434 (1987); MCI Communications Corp., *Memorandum Opinion and Order*, 2 FCC Rcd 233, 234 (Comm. Car. Bur. 1987).

²⁷ Morning Star Satellite Co., 16 FCC Rcd at 11555.

²⁸ *Id*; see also Tempo Enterprises, Inc. 1 FCC Rcd 20 (1986) (contingencies involving the final configuration of a spacecraft need not prevent the satisfaction of due diligence milestones); GE American Communications, Inc., *Order and Authorization*, 16 FCC Rcd 11038, 11042 (Int'l Bur. 2001) (licensee entered into a non-contingent contract even though its application to modify its authorization to add ISL's was pending).

²⁹ *CAI Data Order*, 16 FCC Rcd at 14277.

³⁰ See, e.g., EchoStar Satellite Corporation Modification of Ka-band Authorization, *Memorandum Opinion and Order*, 17 FCC Rcd 8305, 8308 (Int'l Bur. 2002).

³¹ Columbia Communications Corp., *Order on Reconsideration*, 18 FCC Rcd 9448, 9452-53 (Int'l Bur. 2003).

without merit. A waiver is appropriate only when granting such relief would not disserve the underlying purpose of the requirement in question and would better serve the public interest than enforcing the requirement.³² The requirement that FSS licensees must enter into a non-contingent contract within one year of receiving their space station licenses serves the purpose of preventing warehousing of spectrum by licensees not willing and able to make prompt use of the spectrum reserved for them. It would disserve that purpose to waive the requirement to allow CAI Data to wait for a previously assigned location to become available.

IV. CONCLUSION AND ORDERING CLAUSES

14. CAI Data's authorization expressly provides that the license will become null and void in the event CAI Data failed to satisfy any one of the milestones. CAI Data voluntarily refrained from entering into a timely non-contingent construction contract in the hope that 87° W.L. would become available and assigned to CAI Data. We find no good cause to waive or extend the milestone. Based on the foregoing, we conclude that CAI Data's failure to satisfy its milestone renders its authorization null and void. Consequently, its request for reassignment is moot.

15. Accordingly, IT IS ORDERED, that the Ka-band license granted to CAI Data Systems, Inc., File Nos. 88-SAT-P/LA-97; 32-SAT-AMEND-98; IBFS Nos. SAT-LOA-19970702-00057; SAT-AMD-19971219-00199; and SAT-AMD-19990930-00093 is declared NULL and VOID.

16. It is FURTHER ORDERED, that CAI Data Systems Inc.'s Petition for Extension or Waiver of its construction commencement milestone is DENIED.

17. It is FURTHER ORDERED, that CAI Data Systems, Inc.'s Request for Reassignment is DISMISSED as MOOT.

18. It is FURTHER ORDERED, that the orbital location assigned to CAI Data Systems, Inc. in 16 FCC Rcd 14269 (Int'l Bur. 2001) is available for reassignment.

19. This Order is issued under delegated authority, 47 C.F.R. § 0.261.

FEDERAL COMMUNICATIONS COMMISSION

Donald Abelson
Chief, International Bureau

³² *Wait Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).